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In The

Supreme Court of the United States

October Term, 1991

R.A.V.,

Petitioner,

vs.

ST. PAUL, MINNESOTA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Minnesota

REPLY BRIEF

EDWARD J. CLEARY
Counsel of Record
409 Midwest Federal Building
Saint Paul, MN 55101
(612) 224-3781

MICHAEL F. CROMETT
Of Counsel
1708 American National
Bank Building
Saint Paul, MN 55101
(612) 227-5363

Office of the Ramsey County
Public Defender

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

ST. PAUL CITY ORDINANCE SECTION 292.02 IS SIMILAR TO OTHER LAWS WHICH THIS COURT HAS SAID COULD *NOT* BE SAVED BY NARROWING CONSTRUCTIONS GIVEN BY STATE COURTS.

Invoking federalist precepts, Respondent emphasizes the authoritative nature of a state's highest court's interpretation of its laws. In doing so, Respondent seeks to narrow and close off review by this Court. Criticizing the Court's opinions, Respondent attempts to distinguish decisions that hold that a law may be so substantially overbroad that it cannot be narrowly construed in a successful manner by a lower court. Thus, Respondent contends that in *Lewis v. City of New Orleans*, 415 U.S. 123 (1974), this Court "ignored" the state court's decision and in *Gooding v. Wilson*, 405 U.S. 518 (1972), the Court "seized" on earlier decisions. In *City of Houston v. Hill*, 482 U.S. 451 (1987), Respondent notes only that the "fighting words" doctrine was not overruled outright. (Resp. Br. at 18).[1] Finally the Respondent fails to address *Kolender v. Lawson*, 461 U.S. 352 (1983), where this court rejected the state of California's attempt to narrowly construe an unconstitutionally vague loitering statute.

Respondent also engages in a tautology by suggesting (a) this Court's review of the ordinance is limited to a review of the narrow construction of the Minnesota Supreme Court and (b) since that court narrowed the ordinance to "fighting words," which describe "illegal conduct", section 292.02 survives constitutional analysis.

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[1] "Resp. Br." refers to Brief of Respondent.

Carried to its logical conclusion, this type of circular reasoning could result in a lower court saving any overbroad or vague speech-regulating provision by "construing" the law in question to outlaw only that speech not protected by the First Amendment. Clearly such an interpretation would undermine the jurisdiction of this Court and could lead to widespread regional abuse of the First Amendment. State legislatures effectively would be given authority to enact overbroad laws aimed at unpopular minorities since state courts could avoid constitutional review by engaging in supposed "saving" narrow constructions.

The final determination of whether a law is repugnant to the Constitution of the United States, whether as written or as construed, remains exclusively with this Court. 28 U.S.C. § 1257 (a) (1988). In *Gooding v. Wilson, supra* at 520, the Court noted that even *after* being narrowly construed by the lower court, the law must punish only unprotected speech and not be susceptible to application to protected expression. This Court rejected the argument, now being raised by the Respondent, that since the lower court narrowed the law in question to "fighting words" only unprotected speech was prohibited and the constitutional inquiry was at an end. Finding that the court had not truly narrowed the application of the law to "fighting words", this Court noted that the lower court's interpretation left a broad standard that effectively "licenses the jury to create its own standard in each case." Such a standard meant that the narrowly construed law had not been construed "so as to avoid all constitutional difficulties". *Gooding v. Wilson, supra* at 528 (citing *Herndon v. Lowry*, 301 U.S. 242, 263 (1937)).

Lewis v. City of New Orleans, 415 U.S. 123 (1974), also exemplifies the failure of a lower court to save a defective law in the face of a constitutional challenge of overbreadth and vagueness. Upon remand from this Court, the court stated that the law applied to "fighting words uttered to specific persons at a specific time. . . . " *Id.* at 131.[2] While appearing to have narrowly construed the law, the lower court demonstrated that it intended a much broader scope of the law, to reach |" . . . the cursing or reviling of or using obscene or opprobrious words to a police officer while in the actual performance of his duty. . . . " *Id.* at 132. This Court noted that it found "nothing in the opinion of the [state court] that makes any meaningful attempt to limit or properly define" the terms of the ordinance. *Id.* at 133.

Respondent disregards the implications of this Court's decisions in *Lewis* and *Gooding*. Like the lower courts in those cases, the Minnesota Supreme Court sought to narrowly construe the law while revealing a scope far broader than that permitted by such a narrow construction. The language of the decision demonstrates that the ordinance reaches far beyond mere "fighting words" or "imminent lawless action" and makes it clear that all cross burnings should be, and would be, prohibited by this ordinance.

> The burning cross is itself an unmistakable symbol of violence and hatred based on virulent

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[2] These limitations parallel Respondent's analysis of the narrow construction of section 292.02. (Resp. Br. at 5). In *Lewis* this type of limitation was insufficient to save the law.

notions of racial supremacy.* It is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear.

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*See, Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2365-66 (1989): "There are certain symbols and regalia that in the context of history carry a clear message of racial supremacy, hatred, persecution, and degradation of certain groups. The swastika, the klan robes, the burning cross are examples. . . . "

In re R.A.V., 464 N.W.2d 507, 508 (Minn. 1991).

This broad language used by the court at the outset of its opinion cites three examples of symbolic speech that under any circumstances constitute "fighting words" or "imminent lawless action." Respondent adopts this reasoning in its argument. (Resp. Br. at 19, 20).

Other decisions of this Court indicate that there are some laws which are so substantially overbroad that they are constitutionally impermissible with or without a narrow interpretation by a lower court. In *City of Houston v. Hill*, 482 U.S. 451 (1987), this Court struck down an ordinance, even though the state court had not had the chance to construe it, because the ordinance was not susceptible to a limiting construction. In *Erznoznik v. City of Jacksonville*, 422 U.S. 204 (1975), the lower court did not attempt to narrowly construe a public nuisance law by limiting the reach of the ordinance to movies that are obscene to minors, " . . . perhaps because a rewriting of the ordinance would be necessary to reach that result". *Id.* at 216 n.15.

The lower court's attempt to incorporate the "fighting words" doctrine into this content-based provision is inconsistent with the " . . . fundamental First Amendment principle that ideological outrage at the content of a communication is an inadequate predicate to the application of the fighting words doctrine." Gard, *Fighting Words As Free Speech*, 58 Wash. U.L.Q. 531, 546 (1980). Indeed, "[i]n a democratic society even the most odious ideas must be afforded constitutional protection if the society is to retain its essential characteristic of popular self-governance. The possibility that an addressee's justifiable outrage at the content of the ideas expressed may be manifested by unlawful violence cannot be permitted to sanction a different result." *Id.* at 547-48. The fighting words doctrine, within the context of the surrounding language of section 292.02, is particularly dangerous because it may suppress a great deal of expressive behavior.

> A strictly limited fighting words concept is consistent with the views of Zechariah Chafee, whose writings provided the definition of "fighting words" that the Court adopted in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572. See, Z. Chafee, *Free Speech in the United States*, 151, 152 (1941). In the same book, shortly after the passage proposing this definition, Chafee qualified his account of fighting words: "This breach of peace theory is peculiarly liable to abuse when applied against unpopular expressions and practices. It makes a man a criminal simply because his neighbors have no self control . . . Thus . . . these crimes of injurious words must be kept within very narrow limits if they

> are not to give excessive opportunities for outlawing heterodox ideas."

Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 Duke L.J, 484, 509-10 n. 126.

The attempt to narrowly construe section 292.02 also results in vagueness. As this Court has noted, there is more to the vagueness doctrine than a notice requirement. In *Kolender v. Lawson*, 461 U.S. 352 (1983), the Court outlined the requirement that a legislature establish minimal guidelines to govern law enforcement. *Id.* at 358. The Court distinguished *Parker v. Levy*, 417 U.S. 733 (1974), "because of the factors differentiating military society from civilian society" and *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), since "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow". *Kolender v. Lawson, supra* at 359 n. 8.

It is not enough for a court simply to construe a law narrowly, the court must comply with constitutional principles in doing so. Without this qualification, any ordinance, statute, or law could be saved by mere reference to a category of speech or expressive conduct which falls "outside the protection of the First Amendment". Without this limitation, the ordinance in *Hill* could have successfully been construed to reach only "fighting words" and the law in *Erznoznik* could have been saved by a construction that "narrowed it" to "obscenity". The argument of Respondent, that a substantially overbroad law can be saved through a general reference to "expressions . . . which the First Amendment does not protect,"

In re R.A.V., 464 N.W.2d 507, 511 (Minn. 1991), is circular and cannot withstand constitutional analysis.

I.

EVEN NARROWLY CONSTRUED, SECTION 292.02 REMAINS UNCONSTITUTIONALLY OVERBROAD AND VAGUE.

Accepted principles of constitutional law and judicial review require this Court to review the law as construed by the state's highest court. In other words, the construction of the lower court should be reviewed by this Court "as though the precise words had been written into this ordinance." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). Under this standard, as construed by the state court, St. Paul, Minn., Ordinances, ch. 292, § 292.02 (1990) would provide:

> Whoever places on public or private property, a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know (constitutes fighting words or imminent lawless action) on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Even with this narrowing language, the ordinance retains most of its overbreadth and results in impermissible vagueness as well. Section 292.02 continues to address all forums, proscribes both symbolic and written expression, prohibits specific symbols reflecting continued viewpoint discrimination, retains an overbroad scienter

provision and fails to limit the ever expanding list of aggrieved classifications.

Petitioner has not misconstrued what constitutes a "public forum". (Resp. Br. at 25). In fact, the very kinds of expression referred to as "core political expression" by the Respondent are addressed by section 292.02. Petitioner agrees with Respondent that picketing, marching, and political demonstration "lie at the heart of public expression." (Resp. Br. at 25). There are many public arenas within the city of St. Paul, including the steps of the State Capitol, which by tradition have been used as forums for free expression. This ordinance, even as *narrowly construed,* continues to chill core political expression since symbolic or written conduct *could* fall under the prohibition of "fighting words" or "imminent lawless action". A demonstration of opposing political viewpoints in a designated public forum regarding an emotional issue could easily result in accusations that certain expressions constitute "fighting words." One need only consider the possibility of politically motivated accusations at a pro-life or pro-choice demonstration resulting in the enforcement of the ordinance.

Respondent (and *Amici*) misstate the scienter requirement under section 292.02, both as written and as construed. Respondent repeatedly refers to the scienter "requirement" of section 292.02, (Resp. Br. at 5, 8, 9, 14, 15, 16), and even refers to this scienter as "carefully limited" and as a "critical limitation." (Resp. Br. at 5, 15). Respondent's restrictive analysis of the scienter requirement of section 292.02 results in an improper interpretation of the language of the ordinance, as written *or* as construed.

The scienter requirement of section 292.02 provides that one can be charged with a crime when he or she "knows or has reasonable grounds to know" that his or her (expressive conduct) (arouses anger, alarm, or resentment in others) (or constitutes fighting words or imminent lawless action) on the basis of race, color, creed, religion or gender." St. Paul, Minn., Ordinances, ch. 292, § 292.02 (1990).

The *mens rea* requirement in statutory crimes can be characterized as requiring subjective fault, objective fault, or strict fault. Crimes with a requirement of "intent" or "knowledge" involve subjective fault. Crimes with scienter of "having reason to know" involve objective fault. The disjunctive "or" between the scienter requirement of "knows" or "has reasonable grounds to know" in section 292.02 results in a broad objective standard of guilt similar to a negligence standard. LaFave, *Substantive Criminal Law,* § 3.4 (a) at 298 (2d ed. 1986). The objective fault lies in creating an "unreasonable risk" and the actor need not realize the risk in order to be negligent. No subjective fault is required under this portion of the scienter provision. *Id.* § 3.4 (c) at 300.

The scienter requirement under this section as written and as construed is far from "carefully limited". The practical effect of this broad scienter provision is an impermissible restriction on the content of the message conveyed by the expressive conduct. It is not necessary to prove that the accused knew or intended to create "fighting words". Nor is there a requirement in the ordinance, as written or as construed, that the expressive conduct must "threaten harm to others." (Resp. Br. at 20). Rather

the political expression is subject to a negligence standard, allowing an audience to determine what expression is permitted based on its agreement or disagreement with the content of the message. This gives an audience the ability to censor the expression of an opposing viewpoint under the guise of a "fighting words" characterization. The Minnesota Supreme Court's narrowing construction of the ordinance fails to limit this scienter provision. This construction creates vagueness, subjects the law to selective enforcement, and fails to reduce the chilling effect of the ordinance.

Respondent relies extensively on *United States v. Lee*, 935 F.2d 952 (8th Cir. 1991). (Resp. Br. at 33-36, 40-41). The opinion and judgment of that court was vacated and petition for rehearing en banc was granted on August 14, 1991. *Id.* at 960. The provision at issue in that case is Title 18, section 241 of the United States Code. That section does not prohibit the burning of a cross but demands a "specific intent" to threaten or intimidate another in the exercise or enjoyment of a federally guaranteed right. The vacated opinion held that that law was content neutral and did not reach a substantial amount of constitutionally protected conduct. Whether or not that decision is later affirmed, section 241 is easily distinguishable from section 292.02.

The substantial overbreadth of section 292.02 endures even after the lower court's narrowing construction. Vagueness remains regarding precisely what constitutes "fighting words" and "imminent lawless action" within the context of the content-based and viewpoint discriminatory ordinance.

II.

UNLIKE *UNITED STATES V. O'BRIEN* AND ITS PROGENY, THE GOVERNMENTAL INTEREST AS REFLECTED IN SECTION 292.02 IS DIRECTLY RELATED TO THE SUPPRESSION OF FREE EXPRESSION.

Respondent inexplicably refers to the ordinance as "content-neutral," "carefully tailored" and furthering a "compelling state interest." These references implicitly recognize that, whether as written or as narrowly construed, the *entire* ordinance must be analyzed. Instead of applying the appropriate content-based test to this type of law, however, Respondent relies on *United States v. O'Brien*, 391 U.S. 367 (1968). (Resp. Br. at 28).

Section 292.02 proscribes symbolic and written expression. It is directly aimed at the communicative impact of the expressive conduct which is proscribed. The governmental interest reflected in section 292.02 is directly related to the suppression of the message conveyed. The government may not proscribe particular conduct because it has expressive elements. Nor is section 292.02 a general law regulating conduct without specifically targeting expression. Thus section 292.02 is distinguishable from laws regulating conduct without reference to the content of the expression, as in *United States v. O'Brien*, 391 U.S. 367 (1968) and in *Barnes v. Glen Theatre, Inc.*, ___ U.S. ___, 111 S.Ct. 2456 (1991). Both the law in *O'Brien* (protecting the existence of selective service cards for national defense purposes) and the law in *Barnes* (proscribing all public nudity) involved governmental interests that this Court found were not directly related to the suppression of free expression. An open-burning law

prohibiting all public burning, regardless of what is being burned, is more analogous to the laws in *O'Brien* and *Barnes*. *See e.g.*, St. Paul, Minn., Ordinances, ch. 56, § 56.01(a) (1956). Under such a law it is the *conduct* of burning in public that is proscribed not the *content* of the message conveyed. Where a law prohibits conduct *because* of its communicative impact, however, this Court has held such laws unconstitutional. *See e.g., United States v. Eichman*, 496 U.S. ___, 110 S. Ct. 2404 (1990); *Spence v. Washington*, 418 U.S. 405 (1974); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Stromberg v. California*, 283 U.S. 359 (1931).

More than half of the states have adopted hate-crime statutes while a number of other states have specifically prohibited cross burning. (*See* Brief of *Amicus* ADL p. 4, A1-A7, B1-B2). The vast majority of the laws referred to as "hate crime" laws are enhancement provisions which apply to existing crimes and enhance the sentence or the class of crime based on the bias motive. These laws are thoroughly distinguishable from section 292.02 since this ordinance creates a separate crime without reference to the enhancement of an existing crime. Among laws cited which specifically address cross burning, the majority of the states usually allow the display of such symbols on private property with a written consent or authorization by the property owner. In order to violate the majority of these laws, one must be found to have *intended* to either *intimidate* or *terrorize* another person. Thus the forums addressed are narrower than those addressed in section 292.02 and the element of scienter requires proof of actual intent.

Various interests are offered in support of section 292.02. While social equality and the elimination of racial

and gender violence are essential social goals, this ordinance is not a constitutionally permissible method of reaching these objectives. It is overbroad and viewpoint discriminatory as written. It is overbroad, viewpoint discriminatory and vague as "narrowly construed". It is disingenuous at best for Respondent to accuse Petitioner of suggesting that violation of section 292.02 is a victimless crime. (Resp. Br. at 41). Petitioner has never suggested that general penal laws would not be applicable to the alleged fact situation. Law enforcement officials can and should vigorously enforce the general criminal code fully and effectively when a crime has been committed. They should not, however, be entrusted with the enforcement of a content-based provision that severely encroaches upon the freedom to express one's personal beliefs, popular or unpopular.

For two centuries, the First Amendment freedom of speech clause has been the one individual right that has distinguished this nation from all others. Freedom of expression is the cornerstone of our form of government and it has withstood attacks from all sides of the political spectrum. As the Bill of Rights enters its third century, we must not allow this Amendment to be diminished in the manner suggested by the Respondent.

CONCLUSION

The judgment of the Supreme Court of Minnesota upholding the constitutionality of St. Paul City Ordinance section 292.02 should be reversed and section 292.02

should be held unconstitutional in violation of the First Amendment to the United States Constitution.

Respectfully submitted,

/s/ Edward J. Cleary
EDWARD J. CLEARY
Counsel of Record
409 Midwest Federal Building
Saint Paul, MN 55101
(612) 224-3781

/s/ Michael F. Cromett
MICHAEL F. CROMETT
Of Counsel
1708 American National
Bank Building
Saint Paul, MN 55101
(612) 227-5363

Counsel for Petitioner